IN THE

Supreme Court of the United States

October Term, 1961

No. 351

THE COUNTY OF LOS ANGELES and the CITY OF LOS ANGELES,
Petitioners,

vs.

SCANDINAVIAN AIRLINES SYSTEM, INC., a New York corporation,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of California

PETITIONERS' REPLY BRIEF

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I.

The Decision of the Court Below Is Based Exclusively on Federal Grounds: (1) The Commerce Clause, U. S. Constitution and (2) Interpretation of Swedish-American Treaty.

Respondent argues that the decision below was in part based upon state grounds because the California Supreme Court attempted justification of its decision

"as a matter of principle" (56 Adv. Cal. 21; Pet. App. A, 29). In so doing the California Court was not basing its decision upon California law, but was instead attempting to justify its use of what it considered to be applicable precedents. The California Court relied principally upon *Hays v. Pacific Mail SS Co.*, 17 How. (58 U.S.) 596, 15 L. Ed. 254 (1855). The California Court in alluding to "principle" was attempting to show that the reason supposedly sustaining the *Hays* decision is still viable.

The express format of the opinion below was discussion and treatment of respondent's contentions that the instant tax is invalid: "(1) the commerce clause of the United States Constitution prohibits the levy of this tax; (2) the tax is further prohibited by the due process clauses of both the federal and California Constitutions; and, (3) there is no California statutory basis for this taxation" (56 Adv. Cal., 7-8; Pet. App. A, 6). Toward the conclusion of its opinion the California Court stated: "We expressly refrain from any decision upon plaintiff's contention that neither the California Constitution nor any statutory provision provides a basis for the instant tax" (56 Adv. Cal., 31; Pet. App. A, 46).

Nor was the decision impliedly based upon any supposed California common law of taxation. In California the rule in taxation is that "the statute is the measure of the power". There are no principles of the common law of taxation. There is no common law

of taxation which prohibits a tax authorized by Constitution and directed by statute; there is no common law of taxation which permits a tax not authorized by Constitution and statute. (*Hill v. Eureka*, 35 Cal. App. 2d 154 (1939); *People v. Allimco Life Ins. Co.*, 65 Cal. App. 2d 808 (1944); *Los Angeles County v. Jones*, 13 Cal. 2d 554 (1939).)

II.

Apportioned State Taxation of Instrumentalities of Foreign Commerce According to Benefits, Protections and Opportunities Afforded the Taxed Property Is Fair, Consonant With Contemporary Legal Principles and Would Likely Induce No Substantial Economic Dislocation or Hardship.

Respondent airline urges that if Justice Traynor's view that the instant tax is valid were upheld foreign nations would be displeased and would retaliate by exercising their sovereign power to exact a similar tax from United States air carriers. Even if respondent's claims should prove correct it is difficult to foresee any substantial adverse economic effects resulting from such foreign taxation. Domestic carriers are subjected to multistate taxation based either upon the facts of domicile or home port, or upon the rendition of opportunities, protections and benefits to the taxed property. Apparently such domestic taxation has produced no substantial economic hardship to the United States carriers. No basis or reason is cited by respondents for

condemning the instant tax because of the prospect of foreign taxation of the type practiced by the States.

If it developed that international multiple taxation were harmful to our national interests, or otherwise undesirable, then the federal Congress or the President through his treaty powers could provide for exemption of such property. Only if it were inconceivable that our national policy would ever favor taxation by the States of foreign owned and foreign based property should the rule of exemption from such taxation become frozen into our national policy by construction of the federal Constitution.

The fact that neither the State of California nor its subdivisions taxes ocean-going ships is not reason for denying the validity of the instant tax. Ocean-going ships generally make only irregular and spasmodic contacts with foreign ports. Such contacts could well be insufficient to satisfy Due Process requirements for State taxation. The law requires a minimal contact between property and State before the latter may exercise any taxing power. Such requirement of minimal contact was particularly noted by Justice Douglas in his concurring opinion in *Braniff Airways v. Nebraska State Board*, 347 U.S. 590, 98 L. Ed. 967:

> "My understanding of our decisions is that the power to lay an ad valorem tax turns on the permanency of the property in the State. All the property may be there or only a fraction of it.

> Property in transit, whether a plane discharging passengers or an automobile refueling, is not subject to an ad valorem tax. Property in transit may move so regularly and so continuously that part of it is always in the State. Then the fraction, but no more, may be taxed ad valorem" (347 U.S., 603, 98 L Ed, 978).

Lack of regular, recurring entry by ship into Los Angeles would seem proper basis for non-taxation thereof. Secondly, there is no requirement that a State tax every species of property in a class similarly. A State may, consonant with the Fourteenth Amendment, exempt particular species from the generally taxable class. (*Board of Tax Commissioners v. Jackman*, 283 U.S. 527, 75 L Ed 1248; *Allied Stores v. Bowers*, 358 U.S. 522, 526-527, 3 L Ed 2d 480, 484-485.) Also, the fact that local tax administrators may mistakenly not levy taxes upon every object taxable under State law, should not thereby constitutionally require the exemption of the whole class of property.

Respondent's argument that "the proceeds of the tax in question are not used for or measured by the benefits conferred upon foreign-based aircraft at Los Angeles International Airport" appears false (Resp. Br., 12). From the very facts asserted by respondent in support of such proposition it would appear that the special airport fees which it pays do not cover the cost of services rendered to it. As noted in Respondent's Brief, p. 4, fn. 5, airport fees equal only about 40

percent of the cost of rendering the services for which the fees are charged. The balance of the airport income is made up of lease income from its concessionaires. Such facts reported by respondent are not inconsistent with the proposition that special airport fees cover only about 40 percent of the cost of their rendition.

Respondent argues that the tax is invalid because constituting unlawful regulation of instrumentalities of communication between nations—a field of regulation preserved exclusively for the national government. There is language in *Pullman's Palace Car Co. v. Pennsylvania*, 141 U.S. 18, 29, 35 L. Ed. 613 which when extracted from its context would support such contention. However, this Court, when making such assertion, did not consider State taxation of instrumentalities of foreign commerce to be *regulation* thereof:

> "For the purposes of taxation, as has been repeatedly affirmed by this court, personal property may be separated from its owner; and he may be taxed, on its account, at the place where it is, although not the place of his own domicil, and even if he is not a citizen or a resident of the State which imposes the tax . . ."
>
> "It is equally well settled that there is nothing in the Constitution or laws of the United States which prevents a State from taxing personal property, employed in interstate or foreign commerce, like other personal property within its jurisdiction . . ." (141 U.S., 22-23).

If the rule of the majority of the Court below were adopted as a constitutional principle of taxation it would have one-sided application. The States cannot be permitted to tax at full value domestically owned and based airplanes, flying exclusively in foreign commerce, because recognition must be accorded the fact of the sovereign power of foreign nations to tax U.S. aircraft whether or not such power is actually exercised at a particular time. (*Standard Oil Co. v. Peck*, 342 U.S. 382, 96 L. Ed. 427.) Exemptions of instruments of foreign commerce, if desirable, should be effected not by constitutional construction but rather by treaty or Congressional act.

Respondent urges that the rule of apportioned taxation of instrumentalities of foreign commerce would permit multiple taxation because the foreign nations would continue to tax their planes on the basis of full value. The answer to that contention is that the federal Constitution was adopted, insofar as the instant matter is concerned, to protect persons, including aliens, from improper impositions by the States. The Fourteenth Amendment cannot, and was not intended, to ensure such persons as respondent from improper taxation by their own countries. It would not seem reasonable to hold that the States may not tax property in proportion to the benefits and protections afforded thereto because the home-port nation has the practice of taxing according to a more onerous standard not dependent upon the benefits, opportunities and protections which it affords the taxed property.

The 1961 California legislation (quoted in full in Resp. Br., App. B) adding Sects. 5301 to 5456 to the California Revenue and Taxation Code should not affect the taxes herein. It does not exempt any foreign airlines, whether government owned or not, which fly in foreign commerce. (Rev. and Tax. Code, Sec. 5303 (a) and (b) (2).) Only foreign-government owned aircraft flying exclusively intrastate in California will hence forth be exempt.

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